

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

ROBERT O. HAYDEN,

Petitioner, : Case No. 3:21-cv-130

- vs -

District Judge Walter H. Rice
Magistrate Judge Michael R. Merz

WARDEN, Chillicothe
Correctional Institution,

:
Respondent.

TRANSFER ORDER

This case is before the Court upon the filing by Petitioner of an Application¹ under 28 U.S.C. § 2244(b) for leave to file a second or successive habeas corpus application (ECF No. 1). The District Court does not have jurisdiction to decide whether Hayden may proceed, but must transfer the case to the Sixth Circuit; both the Supreme Court and the Sixth Circuit describe § 2244(b) as jurisdictional. See *Panetti v. Quarterman*, 551 U.S. 930, 942 (2007); *Post v. Bradshaw*, 422 F.3d 419, 425 (6th Cir. 2005).

If Hayden had actually filed a petition for habeas corpus relief, this Court would be obliged to decide in the first instance whether the new petition was second or successive. *In re: Kenneth Smith*, 690 F.3d 809 (6th Cir. 2012); *In re Sheppard*, 2012 U.S. App. LEXIS 13709 (6th Cir. May

¹ Although the Clerk has docketed this filing as a petition for writ of habeas corpus, in fact it is an application for leave to file a second or successive petition.

25, 2012). Although Hayden has captioned his filing in this Court, he labels it not a petition, but a motion under 28 U.S.C. § 2244.

For the use of the Sixth Circuit in deciding whether Hayden may proceed, the Magistrate Judge summarizes Hayden's prior habeas history in this Court.

In Case No. 3:01-cv-002, Hayden filed a Habeas Corpus Petition on January 2, 2001. The case was dismissed on initial review under Rule 4 of the Rules Governing § 2254 Cases. However, the case occurred before the Court converted to an electronic docket and the paper file is now stored at the Federal Records Center in Chicago, Illinois, under Accession No. 021-06-0205; Location No. 864252-864305; Box 48 of 54.

On November 13, 2002, Hayden filed a new Petition for Habeas Corpus in Case 3:02-cv-530. In recommending dismissal, Magistrate Judge Sharon Ovington of this Court wrote that Hayden was "challenging as void his criminal conviction [for rape] in 1990 in the Court of Common Pleas, Montgomery County, Ohio. More than thirteen years ago in May 1990, Hayden waived his right to trial by jury, and his case proceeded to a bench trial" (Report and Recommendations, ECF No. 22). District Judge Thomas Rose of this Court adopted that recommendation and dismissed the case on August 26, 2004 (ECF No. 27). Hayden apparently did not appeal. Some of the records in that case are now digitized; the full paper file is at Federal Records Center Chicago; Accession No. 021-08-0174; Location No. 131654-131666. Box 7 of 7.

On July 1, 2016, Hayden filed a new Petition for habeas corpus in Case No. 3:16-cv-286. In that Petition he challenged the fact that he was being held in prison after his sentence for the 1990 rape had expired. However, at the time for the 1990 rape, he was on parole for a 1984 rape and parole was revoked. A judge of the Montgomery County Court of Common Pleas determined the two sentences were required to be served consecutively and this Court dismissed the Petition

because the case involved a question of state, not federal constitutional, law (Report, ECF No. 2; Judgment, ECF No. 15), affirmed, *Hayden v. Mohr*, Case No. 16-4051 (6th Cir. May 4, 2017)(unpublished; copy at ECF No. 16).

The Court's record indicate two prior habeas corpus petitions filed by Hayden after his 1990 conviction and while incarcerated at the Montgomery County Jail, Cases No. 2:94-cv-930 and 2:95-cv-599. However both of these cases were fully adjudicated before the Court's records were digitized and no Federal Records Center location for them is noted on the dockets.

The Clerk is hereby ORDERED to transfer this matter to the United States Court of Appeals for the Sixth Circuit for its consideration under 28 U.S.C. § 2244.

April 27, 2021.

s/ *Michael R. Merz*
United States Magistrate Judge